

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE L. JAMISON,

Defendant-Appellant.

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UNPUBLISHED

April 16, 1999

No. 199876

Oakland Circuit Court

LC No. 95-139224 FH

Before: Murphy, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with the intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Thereafter, defendant pleaded guilty to felon-in-possession of a firearm, MCL 750.224f; MSA 28.421(6), and to being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. Defendant was subsequently sentenced to an enhanced term of four to forty years' imprisonment on the possession with intent to deliver conviction, his second offense, MCL 333.7413(2); MSA 14.15(7413), two years' imprisonment on the felony-firearm conviction, and two to five years' imprisonment on the felon-in-possession conviction. The court vacated the felon-in-possession conviction, and resentenced defendant for this conviction as a fourth habitual offender to an enhanced term of two to twenty years' imprisonment. The sentences were to run consecutively to one another and to the sentences defendant was already serving as a result of his parole status. Defendant now appeals as of right. We affirm.

Defendant first contends that the trial court erred in denying his motion to suppress certain items seized from the home in which he had been arrested. Defendant filed a pretrial motion to suppress the evidence, which was denied by the trial court. However, he has failed to provide this Court with transcripts of either his preliminary examination or motion to suppress hearing, both of which apparently contain a complete description of the factual development and the court's ruling. Without these transcripts containing the basis for the decision to deny defendant's motion, we are unable to properly review this claim of error. Accordingly, defendant has waived our review of this issue. MCR 7.210(B)(1)(a); *People v Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995). Furthermore,

to the extent we may review defendant's claim in light of the testimony given at trial, we would conclude that the trial court did not err in denying defendant's motion to suppress on the basis that the police officers acted properly pursuant to the exigent circumstances exception to the warrant requirement. *People v Blasius*, 435 Mich 573, 593-594; 459 NW2d 906 (1990).

Next, defendant argues that officials from the Michigan Department of Corrections (MDOC) erroneously ordered him to serve consecutive sentences for his convictions when the trial court had imposed concurrent sentences. Defendant correctly notes that in Michigan, only judges have authority to impose sentences on individuals convicted of an offense in violation of the penal code. MCL 769.1; MSA 28.1072. Nonetheless, we are not convinced that the MDOC officials engaged in any improper misconduct by altering defendant's sentences. A review of the sentencing transcript reveals that the trial court made conflicting pronouncements regarding the manner in which defendant's sentences would be served.

*The Court:* It is the sentence of the Court that the Defendant, as it relates to the count of delivery of a controlled substance under 50 grams . . . is sentenced from four to 40 years in the state prison.

As to the felony firearm charge, the Defendant is sentenced to two years in prison.

As to the charge of felon in possession of a firearm, the Defendant is sentenced to two to five years in prison. That sentence is vacated.

As it relates to the habitual fourth, the Defendant is sentenced from two to 70 years in prison. The sentences run *concurrently*. [Emphasis added.]

[*The Prosecutor*]: Excuse me, your Honor, I believe that's two to twenty on the habitual fourth.

\* \* \*

*The Court:* Two to 20 on the habitual fourth. The sentences run *consecutively*. . . . [Emphasis added.]

[*The Prosecutor*]: Your Honor, and these will be consecutive to his parole case?

*The Court:* They're *consecutive* to the parole. [Emphasis added.]

Apparently, the trial court simply misstated initially that the sentences were concurrent. The judgment of sentence clearly reflects that the trial court intended to and did impose consecutive sentences.

Moreover, the trial court properly imposed these consecutive sentences. Defendant suggests that he should not be required to serve his controlled substance sentence consecutively to his enhanced

habitual offender sentence.<sup>1</sup> MCL 333.7401(3); MSA 14.15(7401)(3) specifically provides that defendant must serve his controlled substance sentence “consecutively with any term of imprisonment imposed for the commission of another felony.” Therefore, the trial court properly ordered that defendant’s controlled substance sentence must be served consecutively to his enhanced felon-in-possession sentence. The fact that defendant’s felon-in-possession sentence was vacated and then enhanced pursuant to the habitual offender provisions does not change the fact that he was convicted of another felony, in addition to the controlled substance offense, and must serve a consecutive sentence pursuant to the controlled substance statute.

Defendant also claims that the trial court erred in denying his motion for directed verdict because the evidence produced at trial was legally insufficient to establish that he had constructive possession of the contraband, and therefore, the prosecution failed to prove the essential elements of the controlled substance and felony-firearm offenses beyond a reasonable doubt. When reviewing a challenge to the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution, and give them the benefit of every reasonable inference that can be drawn from the evidence, to determine whether a rational trier of fact could find that the essential elements of the offense were proven beyond a reasonable doubt. *People v Warren*, 228 Mich App 336, 343; 578 NW2d 692 (1998). In deciding this issue, this Court should not interfere with the jury’s role of determining the weight of the evidence or the credibility of witnesses. *Id.*

To support a conviction for possession with intent to deliver less than fifty grams of cocaine, it is necessary for the prosecutor to prove four elements: (1) that the recovered substance is cocaine,<sup>2</sup> (2) that the cocaine is in a mixture weighing less than fifty grams, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the cocaine with the intent to deliver. *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748, modified on other grounds 441 Mich 1201 (1992). A person may be convicted of possession of a controlled substance if he has either actual or constructive possession of the substance. *Id.* at 519-520. Possession need not be exclusive, but may be joint, with more than one person actually or constructively possessing the controlled substance. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). A person has constructive possession of a controlled substance if he has the right to exercise control over it and has knowledge that it is present. *Wolfe, supra* at 520. A person’s presence at the location where the drugs are found is not sufficient, by itself, to prove constructive possession; some additional link between defendant and the contraband must be shown. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). However, circumstantial evidence, and the reasonable inferences which arise from the evidence, can be sufficient proof of possession. *Id.*

The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempt to commit a felony. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Possession of a firearm may also be either actual or constructive, and may be joint. *People v Hill*, 433 Mich 464, 466, 470; 446 NW2d 140 (1989). A defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably and readily accessible to the defendant. *Id.*; *People v Williams*, 212 Mich App 607, 609-610; 538 NW2d 89 (1995).

Here, we find that the prosecutor presented sufficient circumstantial evidence to establish defendant's constructive possession of both the narcotics and the weapon found in the basement of the house, as well as the other requisite elements of the charged crimes. Defendant was present in the house when the police executed the search warrant. The officer who discovered him crouched next to a freezer in a corner of the basement testified that she also spotted a semiautomatic weapon lying within defendant's reach, one to two feet away from him. See *People v Williams (After Remand)*, 198 Mich App 537, 539; 499 NW2d 404 (1993) (sufficient evidence existed to support jury's finding of constructive possession when the record showed a loaded gun was found inside a metal box located within a padlocked wooden safe in the basement of the defendant's home, and defendant was also found in the basement). Another officer who searched the basement testified that he found approximately 10.5 grams of cocaine lying on a table within twenty to twenty-five feet of where defendant was discovered. Another officer indicated that he found in the basement some "corner tears," the torn-off corners of sandwich baggies commonly used to package narcotics for distribution, some of which contained a white, powdery substance. Testimony also indicated that throughout the house the officers found several more handguns, ammunition, approximately \$1,000 in cash, several additional quantities of crack and powder cocaine, and an electronic scale commonly used in narcotics distribution. A police expert in narcotics trafficking testified that given all this evidence within the house, he believed the quantities of cocaine inside the house were for distribution, not for personal use. See *Fetterley, supra* at 517-518 (intent to deliver can be inferred from minimal circumstantial evidence, including the quantities of controlled substance discovered and the manner in which packaged). This evidence was properly considered in light of the fact that occupants of the house's front porch entered the house as police approached, that as the police approached closer an officer testified to hearing running footsteps within the house, and in light of the suspicious activity observed by the officers within the two weeks prior to this incident during two surveillances of the house. Both of the surveillances revealed heavy trafficking in and out of the house, suggesting illegal drug activity therein. Viewing this evidence in the light most favorable to the prosecution, we find it sufficient to support the jury's conclusions beyond any reasonable doubt that defendant was guilty of both possession with intent to deliver and felony-firearm.

Finally, defendant argues that the trial court erred in denying his request for the following instruction regarding the jury's duty in a situation where the prosecutor's case is based primarily on circumstantial evidence:

The prosecution must negate every reasonable theory consistent with the Defendant's innocence. If evidence is open to two reasonable constructions, one indicating guilt and the other innocence, it is your duty to accept the construction indicating innocence.

This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them. *Davis, supra* at 54. Even if the instructions are somewhat imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected defendant's rights. *Id.* Thus, no error will result from the omission of an instruction if the instructions as a whole covered the

substance of the omitted instruction. *People v Messenger*, 221 Mich App 171, 177-178; 561 NW2d 463 (1997).

This Court has previously rejected similar arguments proposed by other defendants whose convictions for various offenses were based primarily on circumstantial evidence. *People v McFall*, 224 Mich App 403, 414; 569 NW2d 828 (1997); *People v Moore*, 176 Mich App 555, 556; 440 NW2d 67 (1989); *People v Seabrooks*, 135 Mich App 442, 454-456; 354 NW2d 374 (1984). In doing so, this Court noted that the instruction is only required where the circumstantial evidence against defendant is weak, and need not be given where there is any direct evidence in support of the conviction. *Moore, supra* at 556-557. The instruction should be omitted where the evidence favoring defendant's theory of innocence is unreasonable in comparison with the evidence favoring guilt because regular use of the instruction would make it extremely difficult to obtain convictions in cases involving circumstantial evidence. *Seabrooks, supra* at 454-455. Moreover, this Court has explained that a trial court's refusal to give this requested instruction does not constitute error where the trial court otherwise adequately safeguarded the defendant's rights by instructing the jury regarding defendant's presumption of innocence, the prosecution's burden to establish guilt beyond a reasonable doubt, and appropriate factors to consider in evaluating witness credibility. *McFall, supra* at 414-415.

In this case, although there was only minimal direct evidence of defendant's guilt, the prosecution offered a substantial amount of strong circumstantial evidence, discussed above, to support his convictions. Therefore, the trial court properly denied defendant's requested instruction. *Moore, supra*; *Seabrooks, supra* at 454-455. Even assuming that the court erred in denying defendant's request, we conclude that the trial court adequately safeguarded defendant's rights by instructing the jury with respect to defendant's presumption of innocence, the prosecutor's burden of proof beyond a reasonable doubt, and the relevant factors the jury should consider in evaluating witness credibility. *McFall, supra*.

Affirmed.

/s/ Hilda R. Gage

/s/ Brian K. Zahra

I concur in the result only.

/s/ William B. Murphy

<sup>1</sup> Defendant concedes that his felony-firearm sentence must be served consecutively to the other sentences imposed by the trial court. MCL 227b(2); MSA 28.424(2)(2).

<sup>2</sup> A police evidence technician testified that the recovered substances were cocaine, and defendant apparently does not dispute this finding.